

The Honorable John C. Coughenour

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

NORTHWEST ENVIRONMENTAL
ADVOCATES, an Oregon non-profit
corporation,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF
COMMERCE, THE NATIONAL
OCEANIC AND ATMOSPHERIC
ADMINISTRATION, and THE UNITED
STATES ENVIRONMENTAL
PROTECTION AGENCY, agencies of
the United States of America,

Defendants,

and

STATE OF WASHINGTON,

Defendant-Intervenor.

NO. 2:16-cv-01866-JCC

STATE OF WASHINGTON'S
REPLY IN SUPPORT OF CROSS-
MOTION FOR PARTIAL
SUMMARY JUDGMENT ON
CLAIMS TWO AND THREE

NOTED: June 8, 2018

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I. INTRODUCTION

Plaintiff Northwest Environmental Advocates requests that the Court punish the State of Washington and its citizens by directing the National Oceanic and Atmospheric Administration (NOAA) and the Environmental Protection Agency (EPA) to withhold grant funds that Washington uses for a variety of important nonpoint source pollution control projects. Plaintiff's Reply Brief does not, and cannot, rebut the fact that the reduced funding for nonpoint source pollution control that Plaintiff seeks in its Motion for Partial Summary Judgment will force Washington to reduce the funding it awards to Indian Tribes, nonprofit organizations, state agencies, and local governments to perform nonpoint source pollution control projects. Nor does Plaintiff rebut the fact that a reduction in nonpoint source pollution control projects will result in increased levels of nonpoint pollution in Washington waters, a result that will be harmful to the citizens of Washington and to the six declarants who submitted declarations to support Plaintiff's standing by testifying to a desire to reduce pollution in Washington waters. Dkts. #27–32. Fortunately, the Court is not required to grant the harmful injunctive relief Plaintiff requests. In fact, the Court is not required to grant any relief to Plaintiff because NOAA and EPA have not found that Washington has failed to submit an approvable coastal nonpoint pollution control program. To the contrary, NOAA and EPA have found that Washington has an approvable program and have worked with Washington and Western Washington Treaty Tribes to improve Washington's approvable program to better coordinate federal funding with the goal of salmon recovery. The Court should grant summary judgment to Washington on claims two and three of Plaintiff's Second Amended and Supplemental Complaint because the agencies have not found that Washington has failed to submit an approvable Coastal Nonpoint Pollution Control Program, which is required before the agencies withhold grant funding from Washington. In the alternative, the Court should conclude that whether Washington's Coastal Nonpoint Pollution Control

1 Program is approvable, presents material issues of fact that precludes a summary judgment
2 ruling on claims two and three.

3 II. ARGUMENT

4 A. NOAA and EPA Have Determined That Washington Has Submitted an 5 Approvable Coastal Nonpoint Pollution Control Program

6 Under 16 U.S.C. § 1455b(c)(3) and (4) NOAA and EPA are required to withhold grant
7 funding from a coastal state only if NOAA and EPA “finds that a coastal State has failed to
8 submit an approvable [Coastal Nonpoint Pollution Control] program” Plaintiff requests
9 that the Court order NOAA and EPA to withhold grant funding for nonpoint source pollution
10 control in Washington because, according to Plaintiff, in 1998 NOAA and EPA “expressly
11 [found] that Washington failed to submit an approvable program for ten of the twelve program
12 components the agencies reviewed.” Dkt. #109, at 2 (citing CZ0005980–CZ0005991).¹ As
13 NOAA and EPA have explained, their decision in 1998 was to approve Washington’s program
14 with conditions and the agencies did not find that Washington failed to submit an approvable
15 program. Dkt. #108, at 19. Since the agencies did not find that Washington failed to submit an
16 approvable program in 1998, the agencies were not required to withhold grant funding from
17 Washington and are not required to do so now.

18 While the record does not support Plaintiff’s argument that the agencies expressly
19 found that Washington failed to submit an approvable program in 1998, the record does
20 support Washington’s argument that in 2012 the agencies expressly found that Washington had
21 submitted an approvable program. CZ0012400 (“NOAA and EPA find that Washington has
22 satisfied all conditions of approval.”). Despite their finding that Washington submitted an
23 approvable program, the agencies delayed a formal finding that Washington’s program was
24 “approved” under 16 U.S.C. § 1455b(c)(1) “in order to encourage the State to work with
25 Northwest Tribes regarding the Tribes’ request that federal agencies take further action to

26 ¹ Defendants filed the Administrative Record in three installments. Citation to the Administrative Record will cite to the bates number stamped at the bottom of the specified page.

1 protect Tribal treaty rights to salmon.” Dkt. #108, at 5 (citing CZ0012472). While the agencies
 2 decided to delay a formal determination that Washington’s program was “approved” under
 3 16 U.S.C. § 1455b(c)(1), neither NOAA nor EPA found that Washington had “failed to submit
 4 an approvable program” under 16 U.S.C. § 1455b(c)(3) and (4). Nonetheless, Plaintiff
 5 speculates that the agencies’ decision to delay a formal determination that Washington’s
 6 program was “approved” under 16 U.S.C. § 1455b(c)(1) demonstrates “that either NOAA or
 7 EPA found that Washington still did not have an approvable program as of 2012.” Dkt. #109,
 8 at 20. There are two significant problems with Plaintiff’s speculation.

9 First, there is nothing in the record to support Plaintiff’s speculation, and only
 10 admissible evidence may be considered in deciding a summary judgment motion. *Miller v.*
 11 *Glen Miller Prod., Inc.*, 454 F.3d 975, 988 (9th Cir. 2006). Plaintiff’s unsupported speculation
 12 is insufficient to defeat Washington’s Cross-Motion for Partial Summary Judgment on Claims
 13 Two and Three. Dkt. #105.

14 Second, Plaintiff’s Second Claim for Relief alleges that “NOAA has found that
 15 Washington failed to submit an approvable Coastal Nonpoint Program” and Plaintiff’s Third
 16 Claim for Relief alleges that “EPA has found that Washington failed to submit an approvable
 17 Coastal Nonpoint Program.” Dkt. #74, at 28–29. Based on these allegations, Plaintiff’s Second
 18 Amended and Supplemental Complaint requests that the Court declare that NOAA violated
 19 16 U.S.C. § 1455b(c)(3) by failing to withhold grant funding from Washington, and that EPA
 20 violated 16 U.S.C. § 1455b(c)(4) by failing to withhold grant funds from Washington.
 21 Dkt. #74, at 33. However, Plaintiff’s speculation that “*either NOAA or EPA*” found that
 22 Washington did not have an approvable program in 2012 does not provide a basis to order both
 23 NOAA and EPA to withhold grant funds from Washington. If NOAA made a finding under
 24 16 U.S.C. § 1455b(c)(3) that Washington did not have an approvable program in 2012, which
 25 NOAA did not do, there would be no basis to order EPA to withhold grant funds under
 26 16 U.S.C. § 1455b(c)(4). Likewise, if EPA made a finding under 16 U.S.C. § 1455b(c)(4) that

1 Washington did not have an approvable program in 2012, which EPA did not do, there would
2 be no basis to order NOAA to withhold grant funds under 16 U.S.C. § 1455b(c)(3).

3 The Court should reject Plaintiff's request to force increased nonpoint source pollution
4 on the citizens of Washington based on Plaintiff's unsupported speculation that NOAA or EPA
5 made a determination that neither agency actually made. Given Plaintiff's failure to support its
6 speculation with any evidence, the Court should grant summary judgment to Washington
7 regarding claims two and three because in 2012 both NOAA and EPA determined that
8 Washington had submitted an approvable Coastal Nonpoint Pollution Control Program.

9 Plaintiff also contends that the agencies' 2012 determination that Washington had
10 submitted an approvable program, was not a determination because it was an unsigned,
11 proposed decision that the agencies did not finalize. Dkt. #109, at 21. At best, this argument
12 simply means NOAA and EPA have not formally "approved" Washington's Coastal Nonpoint
13 Pollution Control Program under 16 U.S.C. § 1455b(c)(1). However, the lack of a formally
14 "approved" program under 16 U.S.C. § 1455b(c)(1) is not a basis for withholding grant
15 funding from Washington under 16 U.S.C. § 1455b(c)(3) or (4). Before NOAA or EPA
16 withhold grant funds from Washington, as Plaintiff requests, the agencies must find that
17 Washington "failed to submit an approvable program." 16 U.S.C. § 1455b(c)(3), (4). The
18 Court must presume that Congress acted intentionally and purposely when it elected to use
19 different language in 16 U.S.C. § 1455b(c)(1) ("program shall be approved") and 16 U.S.C.
20 § 1455b(c)(3), (4) (requiring a finding that "a coastal State has failed to submit an approvable
21 program" before withholding grant funding). *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438,
22 452, 122 S. Ct. 941, 151 L. Ed. 2d 908 (2002). The agencies' proposed decision to formally
23 approve Washington's Coastal Nonpoint Pollution Control Program in 2012 demonstrates that
24 neither NOAA nor EPA found that Washington failed to submit an approvable Coastal
25 Nonpoint Pollution Control Program. The Court should therefore grant summary judgment to
26 Washington regarding claims two and three.

1 Finally, Plaintiff argues that the Court should reject Washington's request that the
 2 Court find that Washington has submitted an approvable program or set that issue for trial
 3 because, according to Plaintiff, whether Washington has an approvable program "is not at issue
 4 in this case" and "such a ruling would impermissibly intrude on the agencies' roles and subvert
 5 NWEA's opportunity to comment on any proposal to approve Washington's program."
 6 Dkt. #109, at 21–22. However, Plaintiff's request that the Court order NOAA and EPA to
 7 withhold grant funds from Washington is necessarily premised on a finding that Washington
 8 has "failed to submit an approvable program." 16 U.S.C. § 1455b(c)(3), (4). Whether
 9 Washington has an approvable program is central to the relief Plaintiff requests. Washington
 10 does not impermissibly intrude on the agencies' roles by simply requesting that the Court make
 11 a finding that is consistent with the agencies' 2012 determination that Washington has an
 12 approvable Coastal Nonpoint Pollution Control Program. Washington agrees that the Court can
 13 grant summary judgment to Washington without having to rule that Washington has an
 14 approvable program because 16 U.S.C. § 1455b(c)(3) and (4) require a finding by NOAA and
 15 EPA that Washington failed to submit an approvable program before the agencies are required
 16 to withhold grant funds from Washington, and neither agency has made that finding.

17 Consistent with Plaintiff's desire to avoid impermissibly intruding on the agencies'
 18 roles, the Court should reject Plaintiff's contention that the agencies' decision in 1998
 19 constitutes a finding that Washington has failed to submit an approvable program because the
 20 agencies have explained that their decision in 1998 was not a finding that Washington failed to
 21 submit an approvable program. Dkt. #108, at 19. The Court should grant summary judgment to
 22 Washington regarding claims two and three because in 2012 NOAA and EPA found that
 23 Washington had submitted an approvable Coastal Nonpoint Pollution Control Program.
 24 CZ0012400. The fact that the agencies delayed finalizing their 2012 decision does not convert
 25 that decision into a finding that Washington failed to submit an approvable program under
 26 16 U.S.C. § 1455b(c)(3) and (4).

III. CONCLUSION

The State of Washington respectfully requests that the Court grant summary judgment to Washington on claims two and three. In the alternative, the Court should conclude that material issues of fact exist regarding whether Washington's Coastal Nonpoint Pollution Control Program is approvable and deny Plaintiff's Motion for Partial Summary Judgment on Claims Two and Three.

RESPECTFULLY SUBMITTED this 7th day of June, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on June 7, 2018, I electronically filed the foregoing document with the Clerk of the Court for the United States District Court for the Western District of Washington by using the CM/ECF system. Participants in this case who are registered CM/ECF users will be served by the CM/ECF system.

DATED this 7th day of June, 2018.

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